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APR 19 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1566

TENNECO INC., a corporation, and TEXAS EASTERN TRANSMISSION CORPORATION, a corporation,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, ELIZABETH V. HALLANAN, its Chairman, and ROBERT L. STEWART and MILFORD L. GIBSON, members of said Commission,

Respondents,

and

THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Intervening Defendant and Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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April 19, 1974

FIDELITY PRINTING COMPANY, HOUSTON

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PUBLIC SERVICE COMMISSION OF WEST
VIRGINIA, ELIZABETH V. HALLANAN,
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and MILFORD L. GIBSON, members of
said Commission,

Respondents,

and

THE NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS

Intervening Defendant
and Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Tenneco Inc., a corporation, and Texas Eastern Transmission Corporation, a corporation, respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 19, 1973.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, reported at 489 F.2d 334, appears in the appendix hereto at page A-1 thereof. The opinion of the United States District Court for the Souhern District of West Virginia, reported at 352 F.Supp. 719, is included in the appendix hereto at page A-11.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 19, 1973. A timely petition for rehearing was denied on January 23, 1974, and this petition for certiorari was filed within ninety days from that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does a state have authority to assess fees against interstate gas pipeline companies to defray the expenses of its regulatory commission although Congress, through the Natural Gas Pipeline Safety Act of 1968, expressly preempted the field and excluded the states from exercising any regulatory functions with respect to interstate gas pipelines regulated by the Federal Power Commission?

2. Do the provisions of the Natural Gas Pipeline Safety Act of 1968, preempting the field of pipeline safety and providing the method and extent of reimbursement for state agencies acting as agent of the Secretary of Transportation, preclude the states from assessing fees against the interstate pipeline companies for further "reimbursement" of such expenses?

3. Does the interpretation of the General Counsel of the Office of Pipeline Safety, as set forth in a letter addressed

to a party to the pending litigation, representing a change in departmental position and dated *prior* to the adoption of amendments expressly covering the subject matter, constitute an administrative interpretation of the Natural Gas Pipeline Safety Act of 1968, as subsequently amended, which is "entitled to great weight"?

STATUTORY PROVISIONS INVOLVED

This controversy involves the interpretation and application of §§3(b) and 5(c)(1) of the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. §§1672(b) and 1674(c)(1), as amended, and §3, Article 5 of the West Virginia Gas Pipeline Safety Act, *W. Va. Code Ann.* § 24B-5-3 (1971). These statutes are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioners Tenneco Inc. and Texas Eastern Transmission Corporation are large interstate natural gas companies regulated by the Federal Power Commission under the Natural Gas Act, 15 U.S.C. § 717, *et seq.* They purchase natural gas in the southern portions of the United States, principally in the States of Louisiana, Texas and Mississippi and transport it through their pipeline facilities located in sixteen states to consumers in the east and northeast for resale and distribution. Petitioners are engaged solely in interstate commerce in West Virginia.

In 1968, Congress enacted the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. § 1671, *et seq.*, providing for safety standards and regulations relating to the design, installation, inspection, testing, construction, operation, replacement and maintenance of interstate gas transmission facilities. State regulation with respect to such matters was expressly precluded by § 3(b),49 U.S.C. § 1672(b).

Pursuant to the provisions of the 1968 federal safety act, the Secretary of Transportation, by regulation, established certain minimum safety standards for the transportation of gas in pipeline facilities subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. These regulations also authorize state agencies, which agree to do so, to act as agents of the Department of Transportation, to inspect interstate pipeline facilities on a voluntary, non-reimbursable basis (49 C.F.R. § 190.6 (1973)).[1]

In 1969, the West Virginia Legislature enacted the West Virginia Gas Pipeline Safety Act (*W. Va. Code Ann.* § 24B-1-1, *et seq.* (1971)) authorizing the Public Service Commission of West Virginia to prescribe and enforce safety standards for pipeline facilities and to regulate safety practices of persons engaged in the transportation of gas to the extent permitted by the federal safety act. Section 24B-5-3(a) of the West Virginia Act purported to impose a special license fee on all pipeline companies, based upon the number of 3-inch equivalent pipeline miles within the state, for the purpose of paying the salaries, costs and other expenses of the Commission in administering the state act. The Commission was also empowered to act as

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[1] The preamble to the Federal safety standards (49 C.F.R. pt. 190 (1968)) issued on November 7, 1968, states in part:

"The Department of Transportation is not yet staffed to enforce the Federal standards applicable to interstate transmission facilities. To provide for enforcement, the Department intends to authorize the States to inspect and oversee those facilities. Since the certifications and agreements provided for in section 5(a) and (b) of the Act do not apply to such interstate facilities, § 190.6 of the regulations authorizes each State that is willing to perform the service to act as the agent of the Department for this purpose. This action will necessarily be voluntary on the part of each State and, since no funds are presently available, will be on a nonreimbursable basis until appropriations are made for that purpose."

agent for the Secretary of Transportation with respect to surveillance and inspection under the federal safety act.

Under the authority of the West Virginia Act, the Public Service Commission of West Virginia assessed a special license fee against Tennessee Gas Pipeline Company, a division of petitioner Tenneco Inc. on January 1, 1970 in the amount of $2,375.33 and likewise, on June 11, 1970, assessed a special license fee against petitoner Texas Eastern Transmission Corporation in the amount of $1,077.44.

On October 30, 1970, the office of the Secretary of Transportation issued guidelines for state agencies serving as agents of the Secretary with respect to surveillance of interstate transmission facilities and operations. The guidelines expressly stated that the federal safety act did not authorize the Secretary to assess interstate transmission operators, inspection or surveillance fees, and that the states, acting as agents for the Secretary, did not have authority to do so (App. A-19). This position and interpretation of the federal safety act was restated by the acting director, Office of Pipeline Safety, in a letter to the Chairman of the West Virginia Commission, dated September 1, 1971, which concluded that if the Commission's fee was intended to contribute towards financing the safety functions being performed by it as agent of the Secretary *"there is no legal basis for the assessment"* and stating further:

> "Similarly, if the fee is intended for safety purposes of the Commission in its own right, there can be no legal basis for it because the Natural Gas Pipeline Safety Act of 1968 preempted safety jurisdiction over all interstate gas facilities and vested that jurisdiction in the Department of Transportation."

On July 20, 1971, the respondent Commission issued a rule against each of the petitioners to show cause why it

"should not comply with the laws of the State of West Virginia relative to the payment of the special license fee". Petitioners, believing that the Department of Transportation's interpretation was correct and that Congress, in enacting the federal safety act, had expressly preempted the field of gas pipeline safety with respect to interstate transmission facilities and that the states had no constitutional power to regulate or supervise interstate transmission facilities and were thus without power to assess and collect the special license fees for the maintenance of their regulatory commissions with respect to interstate pipelines, instituted this action in the District Court for the Southern District of West Virginia for declaratory judgment that the West Virginia Act was unconstitutional as applied to petitioners and for an injunction restraining the respondent Commission from collecting the special license fee from them.

Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1337, 2201 and 2202, petitioners asserting the supremacy of the federal safety act over the West Virginia act.

Following the initiation of the show cause proceeding, the National Association of Regulatory Utility Commissioners (NARUC), an intervenor, was furnished, pursuant to its inquiry, a letter dated February 17, 1972, from the Director of the Office of Pipeline Safety, a copy of which went to the Chairman of the West Virginia Public Service Commission. The letter reaffirmed that the Secretary of Transportation could not delegate to state agencies the authority to assess fees against interstate carriers, but reversed the position previously taken by the Secretary, and stated that on review the Department's General Counsel had determined that the federal safety act had *not* expressly or impliedly prohibited the states from assessing fees

against interstate carriers for their services as agents (App. A-23).

Also during the pendency of this controversy, NARUC urged Congress to adopt certain amendments to the federal safety act which would have expressly permitted the states to assess interstate pipeline companies fees to defray the expenses of the safety program. Congress rejected these amendments. The Committee report accompanying the legislation stated that such NARUC amendments "would make major changes in the Act". *2 U.S. Code Cong. & Adm. News*, 92d Cong., 2d Sess. 3055 (1972).

Instead of the NARUC sponsored method of funding, Congress adopted a contrary plan. It amended § 5(c)(1) of the Act (49 U.S.C.A. § 1674(c)(1)) and provided under certain specified circumstances for the payment of grants-in aid to the states of 50% of the cost of the administration of safety programs. A stated purpose for the particular method of reimbursement adopted by Congress rather than that urged by NARUC was to provide the Secretary, through the ability to withhold payment, with a "sanction short of decertification" to insure that the states complied with the Act and acted satisfactorily as the Secretary's agent in enforcing the federal safety standards for interstate pipeline facilities. *2 U.S. Code Cong. & Adm. News*, 92d Cong., 2d Sess. 3053 (1972).

In considering the original federal safety act, Congress had similarly declined to adopt a method of funding the safety program by direct assessments against the interstate pipeline companies regulated by the Federal Power Commission. These companies are entitled to recover all taxes and fees paid to the states, such as those assessed by West Virginia and in controversy here, through the rates which they charge their respective consumers. Thus, under a

method of funding by direct assessment against the interstate pipeline companies regulated by the Federal Power Commission, it is the particular interstate users of the gas, in this case primarily those located in the eastern metropolitan areas, which ultimately bear the cost of the safety program rather than the taxpaying public in general.

The District Court dismissed petitioners' complaint. The Fourth Circuit affirmed. While agreeing that the Federal Act had preempted the field of pipeline safety, it concluded that notwithstanding the 1972 amendment which dealt expressly with the subject matter, the Federal Act had not precluded the states from obtaining reimbursement of expenses incurred in acting as agents of the Secretary by the imposition of special license fees against interstate pipeline carriers.[2] The lower court also held that the Director's letter to the general counsel of NARUC, during the pendency of the litigation, represented an administrative interpretation "entitled to great weight" even though such letter did not purport to interpret the effect of the 1972 amendments since they had not at that date been enacted.

REASONS FOR GRANTING THE WRIT

1. *The court of appeals has decided an important question of federal law which has not been but should be settled by this Court.*

The assumption of responsibility by the states as agents of the Federal government in matters with respect to which Federal statutes have expressly preempted the related field

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[2] The state assessment does not merely seek recovery of costs not reimbursed pursuant to § 5(c)(1) of the federal safety act; it seeks recovery of all costs.

is unique. This was recognized by the court below which described the federal-state relationship under these circumstances " 'unprecedented in federal utility regulation' " (*See* App. at A-6).

This Court has not previously had before it the extent of the states' authority to tax, levy fees, or otherwise provide for the reimbursement of costs incurred under such circumstances. Specifically, at issue here is whether the states can assess fees against interstate pipeline carriers for the purpose of reimbursing costs incurred in acting as agents of the Secretary of Transportation, notwithstanding the fact that the 1972 amendments to the federal safety act specifically provide a method of reimbursement for such services, that Congress twice rejected the concept of assessing the interstate pipelines directly for the costs of such service, and that all areas of state regulatory authority have been expressly preempted by the federal safety act.

The lower court has erronously, petitioners submit, determined that the states have such authority. That determination is of substantial significance to persons effected by the interstate transportation and utilization of natural gas.

Most natural gas is consumed in areas remote from its production. It is delivered by large interstate pipelines. Gas used in the eastern metropolitan areas is supplied principally from wells in the States of Texas, Louisiana and Mississippi. The Court of Appeals' construction of the federal safety act opens the way for every state, through which petitioners transport gas to assess fees against them for purposes of defraying the states' intrastate safety programs, their activities as agents of the Secretary of Transportation with respect to the interstate facilities, or both. The State of New York has adopted an act providing for the assessment of inspection costs by the New York

Public Service Commission against interstate pipelines having facilities in that state. *N.Y. Pub. Serv. Law* ch. 446 (McKinney 1972). An act, similar to the West Virginia statute, has recently been enacted by the Tennessee legislature. *Tenn. Pub. Acts of 1974* ch. 746. Thirty-nine states have agreed to act and are acting as agents of the Secretary of Transportation in the inspection of interstate pipeline transmission facilities. Thus, while the amount of the fees involved in this case is relatively small, the impact of the decision can be substantial. Based on New York's assessment formula, the amount it would assess Tenneco Inc. alone would exceed $100,000 annually. If New York's formula of assessments were applied in each of the sixteen states through which the pipelines of Tenneco and Texas Eastern pass, the gas consuming public would be required to pay, through safety assessment fees, an additional sum exceeding $4 million annually.[3]

2. *The federal safety act completely preempts the field of pipeline safety including the funding of safety programs and excludes the states from exercising any authority with respect thereto.*

Where the exercise of regulatory functions with respect to facilities in interstate commerce is beyond the constitutional power of a state commission, assessments against such facilities for the maintenance of the Commission are unenforceable. In *Ingels* v. *Morf*, 300 U.S. 290 (1937), this Court said:

> "To justify the exaction of a money payment burdening interstate commerce, it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities, or of enforcing regu-

[3] *See* 1973 FPC Form 2 of Tenneco Inc. and Texas Eastern Transmission Corporation.

lations of the commerce which are within its constitutional power." 300 U.S. at 294.

Following this decision it was held in *Kentucky Natural Gas Corporation* v. *Public Service Commission*, 28 F. Supp. 509 (E.D. Ky 1939), *aff'd per curiam*, 119 F.2d 417 (6th Cir. 1941) that a foreign corporation engaged in the production of natural gas in western Kentucky and southern Indiana and engaged in the transportation and sale of natural gas in interstate commerce was subject only to the regulation and control of the Federal Power Commission under the Natural Gas Act so that assessments against the corporation to support the state commission were improper. Applying the decision in *Ingels*, the district court said:

> "Jurisdiction to regulate the business of the complainant herein involved has been conferred by Congress upon the Federal Power Commission. Its authority is paramount and exclusive.
>
> "Exercise of regulatory and supervisory functions in respect to the complainant's business not being within the constitutional power of the State Commission, it necessarily follows that assessments against the complainant for the maintenance of the Commission are unenforceable." 28 F.Supp. at 513.

This is the case here. As recognized by the court below, the federal safety act expressly preempts the field of pipeline safety regulation and leaves no authority remaining in the state on which to predicate a tax or fee for the maintenance of its state commission's operations.

Furthermore, the state act, which the lower court upheld in its application to petitioners, is directly contrary to and obstructs congressional objectives and intent manifest in the federal safety act in two principal particulars.[4] First, it denies the Secretary of Transportation's sanctions against

[4] *Cf.*, *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

the states which § 5(c)(1) of the federal safety act (49 U.S.C.A. § 1674(c)(1)) was expressly designed to provide. Second, it imposes a method of funding the federal safety program whereby its costs are borne by the consumers of gas rather than the taxpaying public in general.

As originally adopted, the Natural Gas Pipeline Safety Act of 1968 contained no specific provision for the funding of the cost of the safety program. The matter had arisen, however, under a proposal which would have caused the program to be funded through collection of annual fees assessed directly against the pipeline companies. This approach was rejected. The legislative history of the Act indicates that Congress considered such expenses "should be met through the usual route of authorized and appropriated funds" — that is, by the taxpayers in general. *3 U.S. Code Cong. & Adm. News,* 9th Cong., 2d Sess. 3255 (1968).

The Secretary of Transportation by regulation invited the states to act as his agents for the purpose of maintaining surveillance over interstate pipelines.[5] This practice was regarded as a temporary arrangement and was to be on a voluntary, nonreimbursable basis until funds therefor were appropriated by Congress. In 1972, after the adoption of the West Virginia Act and the commencement of this litigation, Congress amended § 5(c)(1) of the federal safety act (49 U.S.C. § 1674(c)(1)) to provide specifically for certain payments to be made to the states *under prescribed conditions* to defray the cost of personnel, equipment and activities of state agencies acting as agents of the Secretary "with respect to interstate transmission facilities". Section 5(c)(1), which became effective August 22, 1972, states:

> "Except as otherwise provided in this section, . . . the Secretary shall pay out of funds appropriated or otherwise made available up to *50 per centum of the cost of the personnel, equipment, and activities of a State agency reasonably required, during the follow-*

[5] 49 C.F.R. § 190.6(a) (1968).

ing calendar year to carry out a safety program under a certification under subsection (a) or an agreement under subsection (b) of this section; *or to act as agent of the Secretary with respect to interstate transmission facilities.* The Secretary may, after notice and consultation with a State agency, *withhold all or any part of the funds for a particular State agency* if he determines that such State agency (A) is not satisfactorily carrying out a safety program under a certification under subsection (a) or an agreement under subsection (b) of this section, or (B) *is not satisfactorily acting as agent of the Secretary with respect to interstate transmission facilities.*"[6]

The scope of congressional consideration of the matter is apparent from the legislative history of the 1972 amendments. In adopting the 1972 amendments, Congress again rejected, as it had in 1968,[7] the concept advanced by NARUC of providing funds for inspection and enforcement by authorizing the various states to make annual assessments against the interstate pipeline companies.

Three bills were considered by the Ninety-Second Congress relating to reimbursement of expenses incurred by state agencies undertaking safety inspections as agents of the Secretary. These were H.R. 5065, S. 980 and S. 1910, identified by the report of the Senate Commerce Committee as a "bill introduced at the request of The National Association of Regulatory Utility Commissioners". *2 U.S. Code Cong. & Adm. News,* 92d Cong., 2d Sess. 3051 (1972). The Senate Committee Report states that NARUC had criticized alleged opposition to "efforts to fund safety inspections of interstate pipelines through assessments of those lines" and that it had recommended that states be authorized "to

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[6] Emphasis in quotations added unless otherwise indicated.

[7] *See* 3 *U.S. Code Cong. & Adm. News,* 90th Cong., 2d Sess. 3255 (1968).

assess interstate pipelines to defray the expense of their safety programs".

Specifically, with respect to the amendments proposed by NARUC, the Senate Committee stated:

> "Amendments proposed by the National Association of Regulatory Utility Commissioners to permit States to set safety standards more stringent than Federal minimum standards (but not incompatible with any Federal law or standard) when necessary to eliminate or reduce a local safety hazard *and to permit States to assess pipelines to fund their safety programs (if funding from other sources is inadequate)* were put before the Committee. Since *these amendments would make major changes in the Act* and would require a period of time for consideration that would delay enactment of the authorizations needed by the Department, *the Committee did not adopt them.*" *2 U.S. Code Cong. & Adm. News,* 92d Cong., 2d Sess. 3055 (1972).

With respect to the manner of compensating the states for acting as agents, the Committee Report states:

> "The Committee recommends that the Secretary of Transportation be authorized to make grants-in-aid up to 50% of the cost of personnel, equipment, and activities of States that act as agent of the Secretary in enforcing Federal safety standards for interstate pipelines. The Department supports this amendment. It originated the practice of entering into agency agreements with States for enforcement purposes because it did not have adequate manpower to enforce compliance itself. It regards the practice as a *temporary arrangement* until such time as the Department is adequately staffed to undertake full responsibility for enforcing compliance by interstate pipelines. *Meanwhile, the States that cooperate with the Department to maintain interstate safety programs should not be required to bear the entire financial burden alone.*" *2 U.S. Code Cong. & Adm. News,* 92d Cong., 2d Sess. 3053 (1972).

The Committee recommended against the NARUC proposal that payment by the Secretary to the states be mandatory, noting that the Department opposed the amendment

> "because it believed that it would inhibit administrative discretion and might lead to indiscriminate payment of federal funds. The discretion presently vested in the Secretary permits him to withhold grants-in-aid from states that do not adequately administer their safety programs. *It gives him a sanction short of decertification to insure compliance by the states with the Act." 2 U.S. Code Cong. & Adm. News,* 92d Cong., 2d Sess. 3053 (1972).

The state act denies the Secretary the "sanctions short of decertification" provided by Congress and renders meaningless the protection referred to in the Conference Committee Report which stated:

> "[T]he Secretary *may, after notice and consultation with a State agency, withhold all or any part of grants-in-aid* for a State when he determines that such State is not satisfactorily carrying out a State safety programs, *or is not satisfactorily acting as agent of the Secretary in enforcing Federal safety standards for interstate pipeline facilites." 2 U.S. Code Cong. & Adm. News,* 92d Cong., 2d Sess. 3065 (1972).

The state act provides for reimbursement of *all* expenses, whether or not the Secretary is satisfied that the state is properly acting as his agent.

In addition, the state act transfers the cost of the program from the taxpayers in general to the ratepayers of the particular interstate pipeline companies involved, contrary to express congressional intent. As costs incurred by petitioners and other interstate pipeline companies regulated by the Federal Power Commission in the payment of license fees, such as those imposed by West Virginia, are

recoverable through their rates, the gas consumers ultimately bear the expense.[8] Charging these consumers as a class through assessments against their pipeline suppliers represents one method of funding safety and surveillance programs. Congress twice rejected this approach, however, and provided a contrary method. Congress clearly intended that the community in general, which also has a stake in the safe operation of gas transmission facilities, should share in the cost of funding safety programs. In upholding the state act as applicable to petitioners, the lower court has thwarted this intent and effectively permitted the costs incurred by West Virginia in acting as agent of the Secretary to be shifted to the consumers in the eastern metropolitan areas.

3. *The lower court misapplied principles of administrative construction of statutes.*

The lower court held that the letter of the Director of the Office of Pipeline Safety to the General Counsel of NARUC dated February 17, 1972, constituted an administrative interpretation of the federal safety act "entitled to great weight".[9] Laying aside the fact that there had been a prior contrary administrative interpretation of the Act and that the purported interpretation was set forth in a letter transmitted during the pendency of this controversy, nevertheless, the stated position of the general counsel of the Office of Pipeline Safety could not be elevated to an administrative interpretation of § 5(c)(1) (49 U.S.C.A. § 1674(c)(1)) since that section had not been adopted at the time this letter was transmitted. The Court of Appeals simply overlooked the fact that the letter *predated* the adoption of the 1972 amendments.

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[8] *See* FPC, Regulations Under Natural Gas Act, 18 C.F.R. § 154.63 (1973); FPC, Accounts, Natural Gas Act, 18 C.F.R. pt. 201 § 408 (1973).

[9] *See* App. A-10, *infra*.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX

A. OPINION AND JUDGMENT OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT, DATED DECEMBER 19, 1973

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 73-1294

TENNECO INC., *a corporation, and*
TEXAS EASTERN TRANSMISSION CORPORATION,
a corporation,

Appelants,

-v-

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
ELIZABETH V. HALLANAN, *its chairman, and*
ROBERT L. STEWART *and* MILFORD W. GIBSON,
members of said Commission,

Appellees,

NATIONAL ASSOCIATION OF REGULATORY
COMMISSIONERS,

Intervenor Appellee,

INDEPENDENT NATURAL GAS ASSOCIATION
OF AMERICA,

Amicus Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA,
AT CHARLESTON. K. K. HALL, DISTRICT JUDGE.

(Argued November 5, 1973. Decided December 19, 1973)

Before BUTZNER, FIELD, *and* WIDENER, *Circuit Judges.*

JOHN O. KIZER (David A. Faber, Campbell, Love, Woodrow and Kizer on brief) for appellants; JOHN E. LEE, General Counsel (Marian W. Louis, Assistant General Counsel, and Cassius H. Toon on brief) for Public Service Commission of West Virginia; SUMNER J. KATZ (Paul Rodgers, General Counsel, and Ray M. Druley, Deputy Assistant General Counsel, on brief) for National Association of Regulatory Utility Commissioners; JEROME J. MCGRATH and FRANCES H. CASKIN on brief for Independent Natural Gas Association of America.)

BUTZNER, Circuit Judge:

This appeal raises the narrow issue of whether the Natural Gas Pipeline Safety Act of 1968[1] has preempted the field of safety regulation of interstate gas pipelines to the extent that a state, which has qualified as an agent of the Department of Transportation, may not assess fees against the interstate lines to help defray the cost of administering the pipeline safety program. The district judge entered summary judgment upholding the imposition of a state license fee on interstate pipelines crossing on West Virginia. We affirm.

There is no dispute about the facts. Tenneco, Inc., and Texas Eastern Transmission Corp. are engaged in the interstate transportation of natural gas by pipeline through West Virginia. Neither company conducts intrastate business there. Acting under authority of state law, the West Virginia Public Service Commission assessed special license fees in the amount of $2,375.33 and $1,077.44, respectively, against the companies based on the length on their adjusted interstate pipeline mileage.[2] The fees, together with those

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[1] Title 49 U.S.C. §§ 1671-1684 (1970).

[2] West Virginia Code Ann. § 24B-5-3(a)(1971) provides:

"(a) Every pipeline company shall pay a special license

collected from other interstate and intrastate pipeline companies, were levied for the purpose of paying the expenses of the Commission.[3] On appeal, the companies make no contention that the fees unconstitutionally burden interstate commerce or that they are disproportionate to the state's share of the cost of conducting safety surveillance of their interstate pipelines. Instead, relying on the fact that their transmission facilities are subject to the jurisdiction of the Federal Power Commission, and not to the West Virginia Public Service Commission, the companies contend that the assessments are invalid because the Natural Gas Pipeline Safety Act of 1968 has preempted the field of pipeline safety with respect to interstate transmission facilities.

The Natural Gas Pipeline Safety Act of 1968 directed the Secretary of Transportation to establish minimum federal safety standards for the design, installation, inspection, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities used for the

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fee in addition to those now required by law. The amount of such fees shall be fixed by the public service commission and levied by it upon each of such pipeline companies according to the number of three inch equivalent pipeline miles included in its pipeline facilities, and shall be apportioned among such pipeline companies upon the basis of the pipeline companies' reports submitted to the commission in such form as the commission may prescribe, so as to produce a revenue of not more than ninety thousand dollars per annum, which fees shall be paid on or before the first day of July in each year."

[3] West Virginia Code Ann. § 24B-5-3(b)(1971) provides in part:
"(b) Such sums collected under . . . subsection (a) of this section shall be paid into the state treasury and kept as a special fund, designated 'public service commission gas pipeline safety fund,' to be appropriated as provided by law for the purpose of paying the salaries of the commission, as fixed by this chapter, its expenses and salaries, compensation, costs and expenses of its employees. Any balance in said fund at

transportation of gas. The Act's text,[4] its legislative history,[5] administration implementation,[6] and judicial interpretation,[7] attest to federal preemption of the field of safety with respect to the establishment and enforcement of standards regulating the interstate transmission of gas by pipeline. The constitutional basis of preemption, in this instance, is the commerce clause,[8] and the supremacy clause.[9] In its brief, the Public Service Commission recognizes the restrictions which the Act imposes, and we perceive no intention on the part of the Commission to infringe

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the end of any fiscal year shall not revert to the treasury, but shall remain in said fund and may be appropriated as provided in this subsection."

[4] Title 49 U.S.C. § 1672(b) provides for the establishment of minimum federal safety standards for the transportation of gas. The section concludes:

"Any state agency . . . may not adopt or continue in force after the minimum Federal safety standards referred to in this subsection become effective any such standards applicable to interstate transmission facilities."

[5] "The relationship of Federal-State regulatory authority created by this bill differs as between local pipelines and interstate transmission lines. In the latter area, the lines of a single transmission company may traverse a number of States and uniformity of regulation is a desirable objective. For this reason, section 3 provides for a Federal preemption in the case of interstate transmission lines." H. R. Rep. No. 1390, 90th Cong., 2d sess. (1968); 3 U.S. Code Cong. & Admin. New, 90th Cong., 2d sess. 3223, 3241 (1968).

[6] In 1973, the Secretary of Transportation reported to Congress that the Department of Transportation through its Office of Pipeline Safety exercised exclusive authority for safety regulation of interstate gas transmission lines. See *Federal-State Regulations in Gas Pipeline Safety* 3, 7, 10 (1973).

[7] "[T]he 'Natural Gas Pipeline Safety Act of 1968' . . . has entered the field of 'design, installation, inspection, testing, construction, extension, operation, replacement and maintenance of pipeline facilities.' . . . As applied to interstate transmission pipelines, the Safety Act must prevail over and pre-empt any state [law]." United Gas Pipeline Co. v. Terrebonne Parish Police Jury, 319 F. Supp. 1138, 1139 (E.D. La. (1970), *aff'd* 445 F. 2d 301 (5th Cir. 1971).

[8] U.S. Const., art. I, § 8.

[9] U.S. Const., art. VI.

the federal government's exclusive authority to prescribe the standards necessary for the safe interstate transmission of gas.[10] But federal preemption of the major aspects of interstate gas pipeline safety does not settle the controversy over the power of West Virginia to levy its statutory fee on the pipelines. Preemption of all phases of interstate gas pipeline safety cannot be inferred from the fact that Congress has occupied a part of the field. Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443 (1960). Federal regulation of an interstate carrier does not preclude state legislation affecting the same carrier unless (1) "the nature of the regulated subject matter permits no other conclusion," or (2) "the Congress has unmistakably so ordained." Florida Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

The first test of preemption — whether the nature of the regulated subject matter permits no other conclusion but preemption — depends primarily on whether the state law under scrutiny obstructs the Congressional objectives. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941). The facts of this case demonstrate that West Virginia's pipeline assessment law fosters state-federal cooperation. Confessing to a lack of staff,[11] the federal government invited the states to act as agents of the Secretary of Transportation for the purpose of maintaining surveillance over the interstate

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[10] West Virginia's Gas Pipeline Safety Act was carefully drafted to avoid infringing on federal regulatory power. W.Va. Code Ann. § 24B-2-1(1971) provides in part:

"The commission shall have power and authority to prescribe and enforce safety standards for pipeline facilities, and to regulate safety practices of persons engaged in the transportation of gas, to the extent permitted by the [Natural Gas Pipeline Safety] 'Act of 1968' and any amendments thereto."

[11] In 1971, the Office of Pipeline Safety had only two full time employees to enforce compliance with federal standards. S. Rep. No. 92-829, 92d Cong., 2d Sess. (1972); 2 U.S. Code Cong. & Admin. News, 92d Cong., 2d Sess., 3049, 3050 (1972). This lack of personnel has persisted. *Federal-State Relations in Gas Pipeline Safety*[9] (1973).

pipelines, to assure compliance with federal regulations.[12] More than a score of states, including West Virginia, accepted this responsibility.[13] The complementary roles of the state and federal governments under the Act provide an opportunity for partnership that has been described as "unprecedented in federal utility regulation."[14] Thus, it is apparent that, instead of preempting every feature of interstate gas pipeline safety, the federal government has invited the states to participate in the program by voluntarily undertaking the indispensable task of inspection. The states, of course, must obtain funds to pay for this work. The West Virginia legislature chose as a matter of state policy to defray her costs by imposing license fees measured by adjusted pipeline mileage.[15]

This record contains no proof that West Virginia's levy unduly burdens interstate commerce, that it is discrimina-

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[12] 49 C.F.R. § 190.6(a) provides in part:

"(a) Any State agency of any State having authority, under the laws of that State, to exercise safety jurisdiction over interstate transmission facilities and that desires to exercise that authority as an agent of the Secretary of Transportation, is hereby authorized to do so."

The scope of the states' authority is explained in 35 Fed. Reg. 13249-50 (1970) quoted in *Federal-State Relations in Gas Pipeline Safety* 10 (1973):

"The agency authority with respect to interstate pipelines authorizes the State to maintain surveillance over the operation to insure compliance with Federal regulations. State personnel should perform the same function that Federal field personnel perform, inspecting operations and giving informal opinions and approvals as to compliance with the regulations.

"The agency authority does not create enforcement authority in the State. Enforcement actions, except those which the operator voluntarily accepts, will be taken at the Federal level.

"The agency authority does not authorize a State to create new standards or to take any action which would substantially change the Federal standards. The Act requires that standards be prescribed by the Department in accordance with applicable rulemaking procedures."

[13] *Federal-State Relations in Gas Pipeline Safety* 28 (1973).

[14] *Federal-State Relations in Gas Pipeline Safety* 3 (1973).

[15] *See* note 2, *supra*.

tory, that it is disproportionate to the state's cost of participating in the safety program, or that it in any way prevents the companies from complying with the 1968 Act. Indeed, it is undisputed that the fees pay part of the cost of the surveillance that is designed to promote compliance with the federal standards. Thus, West Virginia's method of financing its participation in the gas safety program does not obstruct or impair accomplishment of the congressional objective embodied in the Act — the safe interstate transmission of gas. We conclude, therefore, that West Virginia's license fees are not invalidated by the first test of preemption.

We turn to the second test of preemption: has Congress unmistakably ordained that the states are barred from taxing interstate pipelines to help defray the cost of inspection? The companies urge that a 1972 amendment to the Act requires an affirmative answer to this question. The 1968 Act made no provision for reimbursing the states for the expenses they incurred as agents of the Secretary of Transportation. A number of states protested this omission and urged the enactment of legislation to correct it. In 1971, the National Association of Regulatory Utility Commissioners proposed that the states be awarded grants-in-aid to cover up to 50 per cent of their expenses, and that the states' regulatory commissions be authorized to assess interstate pipelines to defray the costs of the states' share of the safety program that was not available from other sources.[16] Congress, however did not adopt this solution to the problem. It provided grants-in-aid to the states of up to fifty per cent of their costs of participation in the interstate safety pro-

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[16] *See* S. Rep. No. 92-829, 92d Cong., 2d Sess. (1972); 2 U.S. Code Cong. & Admin. News, 92d Cong., 2d Sess. 3049, 3052 (1972).

gram,[17] but it did not authorize state utility commissions to assess pipelines.[18]

We find in the 1972 Amendment and in its legislative history no unmistakable congressional intention to bar states from assessing pipelines to pay the remaining fifty per cent of the states' expenses. The fact that Congrss chose not to enact legislation that would authorize state regulatory commissions to assess interstate pipelines under federal law does not establish that Congress intended to prohibit such assessments under state law. To the contrary, the legislative history of the 1972 amendment indicates that Congress was willing to allow the states to select the most feasible means of financing the balance of their costs in light of their own tax structures and budgetary requirements. The Senate Report on the 1972 amendment discloses that Congress was aware that federal officials were administering the Act on the assumption that the states were not inhibited from assessing interstate pipelines to defray the expense of conducting safety surveillance as agents of the Secretary.[19] With this information before it, Congress placed no limitation in the 1972 amendment on the power of the states to continue this method of funding their costs.

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[17] Title 49 U.S.C.A. § 1674(c) (Supp. 1973), Act of August 22, 1972, Pub. L. No. 92-401, § 2, 86 Stat. 616.

[18] The Committee on Commerce found this proposal and others submitted by the National Association of Regulatory Utility Commissioners to be worthy of consideration, but it deferred action because of the delay that major changes in the Act would cause. S. Rep. 92-829, 92d Cong., 2d Sess. (1972); 2 U.S. Code Cong. & Admin. News, 92d Cong., 2d Sess., 3049, 3055 (1972).

[19] "[The National Association of Regulatory Commissioners] criticized . . . interference by the Office of Pipeline Safety in State efforts to fund safety inspections of interstate pipelines through assessment of those lines . . . The Office of Pipeline Safety has subsequently changed its position on the assessment issue, now interpreting the Act not to address State power to assess interstate pipelines . . ." S. Rep. No. 92-829, 92d Cong., 2d Sess. (1972); 2 U.S. Code Cong. & Admin. News, 92d Cong., 2d Sess. 3049, 3052 (1972).

Finally, the companies argue that the Secretary has not delegated to the states that are acting as his agents authority to levy fees against interstate pipelines. This argument, based on a literal application of the law of agency, misconceives the source of the states' taxing power. Concededly, the Secretary cannot authorize states to impose a tax on pipelines, but states possess inherent power to tax that can be exercised in the absence of constitutional prohibition or congressional preemption. Braniff Airways v. Nebraska State Board, 347 U.S. 590, 597 (1954). Here the companies do not invoke the Constitution, and the Secretary, acting through the Office of Pipeline Safety, recognizes that the Act does not preempt the states' taxing power over interstate pipelines. Initially, the officials administering the Act expressed the opinion that states were not authorized to assess fees against interstate pipelines. However, recognizing that this stand was an impediment to cooperation between state and federal governments, the Office of Pipeline Safety, changed its position. It now acknowledges that, considering the overall objectives of the Act, there is no "basis for implying an intent on the part of Congress to preempt the authority of States to tax, assess, or impose fees on interstate operators."[20] This administrative interpretation,

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[20] Letter from Joseph C. Caldwell, Acting Director, Office of Pipeline Safety, to Paul Rogers, General Counsel, National Association of Regulatory Utility Commissioners, February 17, 1972; *see also,* note 19, *supra.*

After reiterating that the Secretary could not delegate authority to a state commission to assess fees against interstate pipelines, the Acting Director wrote in his letter of February 17, 1972:

"The second question was whether or not the Act either expressly or impliedly prohibits a State from assessing fees against interstate operators. Upon review of this question and a thorough analysis of the statutory language and legislative history of the Act, the Department's General Counsel determined that the expressed preemption in Section 3 relates only to the establishment of safety standards and State actions

while not controlling, is entitled to great weight. Zemel v. Rusk, 381 U.S. 1, 11 (1965). We, therefore, conclude that West Virginia's license fee survives the second test pre-emption.

The judgment of the district court is affirmed.

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necessarily associated with the establishment of safety standards. He concluded that this express preemption did not extend to other State activities such as taxation or assessments. He further indicated that considering the overall objectives of the Act, there was no basis for implying an intent on the part of Congress to preempt the authority of States to tax, assess, or impose fees on interstate operators. Based upon this interpretation, it is the Department's position that in adopting the Act Congress did not either expressly or impliedly preempt the power of the States to raise funds.

"The General Counsel did note that there may be other legal bases upon which State statutes could be found invalid, such as, for example, imposition of an unreasonable burden on interstate commerce or discriminatory taxation. However, these are not matters which hinge on his interpretation of the Act."

B. MEMORANDUM ORDER OF THE DISTRICT COURT, ENTERED JANUARY 11, 1973

United States District Court

S. D. West Virginia
Charleston Division

Civ. A. No. 72-52

Tenneco, Inc., a corporation and
Texas Eastern Transmission Corporation,
a corporation, *Plaintiffs,*

v.

Public Service Commission of West Virginia
et al., *Defendants,*

National Association of Regulatory Commissioners,
Intervening Defendant.

MEMORANDUM ORDER

Plaintiff corporations are engaged in transporting natural gas through pipeline facilities from states in the southern and southwestern parts of the United States into and through states in the east and northeast, including West Virginia. Their business is in interstate commerce and subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act, 15 U. S. C., §§ 717 *et seq.*

Defendants are the Public Service Commission of West Virginia and the members thereof. The National Association of Regulatory Utility Commissioners is an intervening defendant.

In this action plaintiffs ask the Court to declare the West Virginia gas pipeline safety statute (W. Va. Code, §§

24B-1-1 *et seq.*) unconstitutional and void and to enjoin defendants from enforcing or attempting to enforce the statute. Plaintiffs reason that the state law violates provisions of the United States Constitution, Article I, Section 8, Clause 3, vesting in the Congress the power to regulate commerce, and Article VI, Clause 2, providing that the Constitution and the statutes enacted thereunder constitute the supreme law of the land. They contend that, when the Congress enacted the Natural Gas Pipeline Safety Act of 1968 (49 U. S. C., §§ 1671-1684), the federal legislation preempted the field of interstate gas pipeline safety and that the West Virginia gas pipeline safety law enacted in 1969 is constitutionally void and unenforceable.

Defendants answered plaintiffs' complaint and filed a motion to dismiss the complaint or, in the alternative, for summary judgment. Plaintiffs filed a motion for summary judgment. The parties agree that there are no disputed questions of fact. The action has been submitted to the Court for decision on the motions.

In their memoranda of law and arguments in support of their respective positions on the pending motions, attorneys have developed several issues.

Defendants' arguments that the Court is without jurisdiction in the action are not persuasive. 28 U. S. C., § 1337. Nor is the Court persuaded that the doctrine of abstention should be here invoked. Lake Carriers' Association v. MacMullan, 406 U. S. 498 (1972); Monongahela Connecting Railroad Co. v. Pennsylvania Public Utility Commission, 373 F. 2d 142 (3rd Cir. 1967); Wright, Law of Federal Courts, § 52 (1970).

Plaintiffs state that the "principal issue is whether the Natural Gas Pipeline Safety Act of 1968 . . . has preempted the field of pipeline safety with respect to interstate trans-

mission facilities." Plaintiffs' Note of Argument, page 9. At page 54 of their Note of Argument plaintiffs state that the "case involves entirely a question of preemption under the Supremacy Clause of the federal Constitution." In their complaint they ask that the West Virginia gas pipeline safety act be declared unconstitutional but in their Note of Argument they reason that the convening of a District Court of Three Judges in the action is not required or justified. 28 U. S. C., § 2281.

Primary consideration will be given to the "principal issue", as presented by plaintiffs, involving "entirely a question of preemption under the Supremacy Clause of the federal Constitution."

The Natural Gas Pipeline Safety Act of 1968 (49 U. S. C., §§ 1671-1684) expressly recognizes state participation in its administration. Pursuant to provisions of the Act, the Secretary of Transportation promulgated rules and standards relating to administration of the gas pipeline safety program and expressly recognized state participation therein. 49 C. F. R., Part 190. Zemel v. Rusk. 381 U.S. 1 (1965).

The West Virginia statute here challenged expressly avoids conflict with the Natural Gas Pipeline Safety Act of 1968 as enacted by Congress. West Virginia Code, § 24B-2-1, limits the reach of the statute "to the extent permitted by the 'Act of 1968' and any amendments thereto." Also, § 24B-2-4 of the state statute responds to the cooperative gas pipeline safety program contemplated in the federal Act of 1968. Th G. S. P. General Order No. 2, entered by the defendant Public Service Commission on April 20, 1970, pursuant to the state statute and made Exhibit 1 with plaintiffs' complaint. limits its application to all pipeline companies subject to the jurisdiction of the Public Service

Commission of West Virginia and to "interstate transmission facilities to the extent permitted by the Act of 1968 and rules promulgated thereunder."

A careful reading of the federal and state statutes and rules promuglated thereunder discloses a clear effort on the part of the Congress of the United States and the Legislature of West Virginia to develop a cooperative program in gas pipeline safety adminstration. Plaintiffs' contentions that the federal government under the United States Constitution has jurisdiction over interstate gas pipeline transportation facilities and that federal statutes, including the Act of 1968 here involved, preempt the field to the exclusion of the state legislation are valid as principles and propositions of law, but are not found to be applicable and controlling in this action. Head v. New Mexico Board of Examiners in Optometry, 374 U. S. 424 (1963); Florida Lime and Avocado Growers v. Paul, 373 U. S. 132 (1963); Northern States Power Co. v. State of Minnesota, 447 F. 2d 1143 (8th Cir. 1971); 16 Am. Jur. 2d, Constitutional Law, § 207 (1964). Plaintiffs have placed much emphasis on United Gas Pipeline Co. v. Terrebonne Parish Police Jury, 319 F. Supp. 1138 (E. D. La. 1970), and the affirmation of that opinion in 445 F. 2d 301 (5th Cir. 1971), but the contrast in facts in that case with the facts in the action before the Court readily discloses its inapplicability.

The federal Act of 1968 does not purport to preempt the field and the West Virginia statute carefully avoids conflict with the federal legislation. Since the construction and application of the West Virginia statute do not appear to have been discussed in any opinion by the West Virginia Supreme Court of Appeals. the state court's holding on the constitutionality of statutes generally warrants restatement. In State ex rel. Appalachian Power Co. v. Gainer, 149

W. Va. 740, 143 S.E. 2d 351 (1965), the state court in points 1 and 5 of the syllabus held:

> In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality. and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legisture, the negation of legislative power must appear beyond reasonable doubt.
>
> The police power is the power of the state, inherent in every sovereignty, to enact laws, within constitutional limits, to promote the welfare of its citizens. The police power is difficult to define precisely, because it is extensive, elastic and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare. It embraces the power of the state to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, safety, morals, health and general welfare of the community. It cannot be circumscribed within narrow limits nor can it be confined to precedents resting alone on conditions of the past. As society becomes increasingly complex and as advancements are made, the police power must of necessity evolve, develop and expand, in the public interest, to meet such conditions.

This Court finds and concludes that the West Virginia gas pipeline safety statute, West Virginia Code, § 24B-1-1 *et seq.*, enacted by the West Virginia Legislature as Chapter 116, Acts of 1969, Regular Session, within the context

of the action now under consideration is not unconstitutional and is not in conflict with provisions of the Natural Gas Pipeline Safety Act of 1968 as enacted by the Congress of the United States. Accordingly, it is

ADJUDGED and ORDERED that plaintiffs' motion for summary judgment be, and it is hereby, denied, and that the defendants' motion to dismiss or, in the alternative, for summary judgment be, and it is hereby, sustained. In view of the Court's decision other issues developed in memoranda of counsel need not be further considered and resolved.

The Clerk is directed to mail, by United States mail, copies of this Memorandum Order to all counsel of record in this action.

ENTER: January 11, 1973.

K. K. HALL
UNITED STATES DISTRICT JUDGE

C. OPS GUIDELINES AND LETTERS

1. Excerpts from OPS guidelines for states serving as agents of the Department of Transportation for interstate gas transmission facilities, dated October 30, 1970.

"OFFICE OF THE SECRETARY
OF TRANSPORTATION
Washington, D.C. 20590

October 30, 1970

SUBJECT: OPS guidelines for States serving as agents of the Department of Transportation for interstate gas transmission facilities.

Recent communications with a number of the interstate pipeline companies and several of the State agencies who have agreed to act as our agents with respect to interstate transmission facilities indicate that some clarification is required as to the extent of the State agency authority and responsibility in this area.

These guidelines are intended to clarify Federal/State/Industry relations in connection with agencies of those States listed below, who have agreed to act as agents of the Secretary with respect to interstate gas transmission facilities.

Connecticut
Florida
Iowa
Kentucky
Maryland
Michigan
Montana
New Hampshire
New Jersey
New York
North Carolina
Ohio
Oklahoma
Pennsylvania
Rhode Island
Utah
Virginia
Washington
West Virginia
Wisconsin
Wyoming
Dist. of Columbia

In the interim Federal safety standards (49 CFR Part 190) which were issued on November 7, 1968, section 190.6 permitted any State agency that so desired to act as the agent of the Federal government in exercising surveillance over the safety programs of interstate transmission facilities. In this regard the preamble contained the following state:

> " 'The Department of Transportation is not yet staffed to enforce the Federal standards applicable to interstate transmission facilities. To provide for enforcement, the Department intends to authorize the States to inspect and oversee those facilities. Since the certifications and agreements provided for in section 5(a) and (b) of the Act do not apply to such interstate facilities, §190.6 of the regulation authorizes each State that is willing to perform the service to act as the agent of the Department for this purpose. This action will necessarily be voluntary on the part of each State and, since no funds are presently available, will be on a nonreimbursable basis until appropriations are made for that purpose.'

The new minimum Federal standards which were issued on August 11, 1970, continued this agency authority. The preamble to those regulations further explained the extent of that authority as follows:

> " 'The agency authority with respect to interstate pipelines authorizes the State to maintain surveillance over the operation to insure compliance with Federal regulations. State personnel should perform the same function that Federal field personnel perform, inspecting operations and giving informal opinions and approvals as to compliance with the regulations.'
>
> " 'The agency authority does not create enforcement authority in the State. Enforcement actions, except those which the operator voluntarily accepts, will be taken at the Federal level.'

"'The agency authority does not authorize a State to create new standards or to take any action which would substantively change the Federal standards. The Act requires that standards be prescribed by the Department in accordance with applicable rulemaking procedures.'"

• • •

Assessment of fees for inspection services.

The Natural Gas Pipeline Safety Act does not authorize the Department of Transportation to assess interstate transmission operators inspection or surveillance fees. Therefore, in acting as agent of the Department, a State agency will not have authority to assess such fees for their safety services as our agent. In addition, the Federal financial support contemplated under Section 5 of the Natural Gas Pipeline Safety Act is limited to partial reimbursement of State agency expenditures covering personnel, equipment and activities applicable only to intrastate gas facilities. Hence, it is suggested that the State agencies consider their overall capability in establishing program priorities in relation to intrastate gas pipeline safety programs which are subject to partial Federal reimbursement, and interstate gas pipeline safety programs for which Federal funds are not authorized.

State Agencies Role In General.

The agency delegation conferred by the Department with respect to interstate transmission lines does not extend to the issuance of regulations, orders, or other legally binding directives. Any additional requirements other than those set forth in the minimum standards imposed by a State agency on interstate operators must be under the authority of State law for some purpose other than those covered by the Natural Gas Pipeline Safety Act. Only the Depart-

ment of Transportation can establish such affirmative requirements for safety under the Natural Gas Pipeline Safety Act.

2. LETTER OF JOSEPH C. CALDWELL, ACTING DIRECTOR, OFFICE OF PIPELINE SAFETY, DATED SEPTEMBER 1, 1971

"OFFICE OF THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590

September 1, 1971

Miss Elizabeth V. Hallanan
Chairman, West Virginia Public
Service Commission
Room E-217, Capitol Building
Charleston, West Virginia 25305

Re: G.P.S. Case No. 40
dated July 29, 1971

Dear Miss Hallanan:

The Tennessee Gas Pipeline Company has referred to us for comment an order and related documents of your Commission, setting for hearing on October 1, 1971, the alleged failure of that Company to pay a special fiscal year 1971-72 license fee of $2,321.93 'for support of the Gas Pipeline Safety Division of the Public Service Commission.'

The Tennessee Gas Pipeline Company owns and operates interstate gas transmission facilities in a number of States, including West Virginia. It is our understanding that the Company neither owns nor operates any intrastate gas facilities in West Virginia.

As you know, the OPS guidelines for States serving as agents of the Department of Transportation for interstate transmission facilities, dated October 30, 1970, copy enclosed, point out on pages four and five that the Natural Gas Pipeline Safety Act of 1968 does not authorize the

Department of Transportation to assess interstate transmission operators inspection of surveillance fees. Therefore, any State agency, in acting as an agent of the Department, does not have authority to assess such fees for their safety services as our agent. On page five of these guidelines it is stated that: 'Any additional requirements other than those set forth in the minimum standards imposed by a State agency on interstate operators must be *under the authority of State law for some purpose other than those covered by Natural Gas Pipeline Safety Act*'. (underscoring added.)

This Office has issued two clarifications of that policy statement. The first is my letter of December 18, 1970, to Mr. Richard E. Solomon, copy enclosed, regarding the filing of construction and design plans. The second is my letter of March 15, 1971, to Chairman George I. Bloom of the Pennsylvania Public Utility Commission. In that letter I again stated, that the Secretary of Transportation has no authority, either express or implied, to impose or authorize fees or assessments on interstate pipeline operators. The letter continued: 'Following the principle of law that an agent can have no more authority than his principal, it is equally clear that he cannot delegate to State agencies any authority for assessments *when acting under the Natural Gas Pipeline Safety Act as agents of the Secretary with respect to interstate transmission facilities.*

"'This does not, of course, affect the rights of a State or State agency to impose fees on the interstate operators under any other authority that it might possess. The Secretary cannot restrict the authority of a State agency when it is acting in any other capacity or under any other legal authority. To the extent that our letter of October 30, 1970, may have implied that a State could not, in some capacity other than as our agent, assess fees for their services, it is not controlling and is modified in accordance with the preceding statement.'

In view of the foregoing and the fact that we have been informed that other interstate operators face the same situation, we would greatly appreciate hearing from you

about the precise purpose for which the special license fee is being assessed against interstate gas transmission operators. If the fee is intended to contribute toward financing the safety functions being performed by your Gas Pipeline Safety Division as an agent of the Department to aid in safety enforcement of interstate transmission facilities, it appears that there is no legal basis for the assessment. Similarly, if the fee is intended for safety purposes of the Commission in its own right, there can be no legal basis for it because the Natural Gas Pipeline Safety Act of 1968 preempted safety jurisdiction over all interstate gas facilities and vested that jurisdiction in the Department of Transportation. On the other hand, if the fee is authorized by State law for the purpose of financing any legitimate function of your Commission, other than safety, which has been assigned to your Gas Pipeline Safety Division, it would be helpful to all interested parties if your Commission would identify such function.

Your reply will help to clarify any misunderstanding which may exist on this subject.

Sincerely,

/s/ JOSEPH C. CALDWELL
Joseph C. Caldwell
Acting Director
Office of Pipeline Safety"

3. LETTER OF JOSEPH C. CALDWELL, ACTING DIRECTOR, OFFICE OF PIPELINE SAFETY, DATED FEBRUARY 17, 1972

"OFFICE OF THE SECRETARY
OF TRANSPORTATION
WASHINGTON, D.C. 20590

February 17, 1972

Mr. Paul Rodgers
General Counsel, National Association
of Regulatory Utility Commissioners
3327 Interstate Commerce Commission Building
P. O. Box 684
Washington, D.C. 20044

Dear Mr. Rodgers:

This letter supplements General Davis' letter of December 17 in reply to your letter of December 9, 1971, in which you raised certain questions with respect to the Department's interpretation of the Natural Gas Pipeline Safety Act. As General Davis indicated in his earlier reply, he asked the Office of Pipeline Safety and the Office of the General Counsel to review the Department's position, taking into account your analysis of the problem. We have completed that review and have found that we should modify our position.

First, I think you should know about the concern with which we approached our review. We fully appreciate the need for active cooperation between State and Federal authorities in the administration of the Act. We further appreciate the need for all of us to devote our full energies to improvements in gas pipeline safety, not to disagreements among ourselves. In short, we took to heart the sentiments expressed by General Davis in his letter of December 17 and his additional instructions to do everything we could to develop a working relationship with the States which would enable State and Federal authorities to move forward together toward our common goal.

As we began our review, it was readily apparent that the Department's position, stated in my letters dated October 30, 1970, September 1, 1971, and September 28, 1971, was an impediment to cooperation between State and Federal authorities. In analyzing the developments which led us to provide by regulation for the establishment of the agency relationship and the events since then, we were concerned with two questions. The first question was whether in permitting States to serve as our agents with respect to interstate transmission facilities as provided for by regulations (49 CFR 190.6), we could also delegate to a State agency the authority to assess fees against interstate gas operators for their service. The answer obviously was, and still is, that we cannot do so.

The second question was whether or not the Act either expressly or impliedly prohibits a State from assessing fees against interstate operators. Upon review of this question and a thorough analysis of the statutory language and legislative history of the Act, the Department's General Counsel determined that the expressed preemption in Section 3 relates only to the establishment of safety standards and State actions necessarily associated with the establishment of safety standards. He concluded that this express preemption did not extend to other State activities such as taxation or assessments. He further indicated that considering the overall objectives of the Act, there was no basis for implying an intent on the part of Congress to preempt the authority of States to tax, assess, or impose fees on interstate operators. Based upon this interpretation, it is the Department's position that in adopting the Act Congress did not either expressly or impliedly preempt the power of the States to raise funds.

The General Counsel did note that there may be other legal bases upon which State statutes could be found invalid, such as, for example, imposition of an unreasonable burden on interstate commerce or discriminatory taxation. However, these are not matters which hinge on his interpretation of the Act.

Our primary concern is to assure that the State agencies who are acting as our agents with respect to interstate facilities do so in accordance with the authority which the Department has given to them. Other questions which may arise between the State agencies and the interstate operators are best left to resolution between those parties. The Department does not intend to become involved in such questions except to the extent that it appears necessary for our administration of the Natural Gas Pipeline Safety Act.

I trust that you will find this is a satisfactory response to the points raised in your letter to General Davis. In particular, I hope that you will find it evidence of our sincere desire to work cooperatively with the States. If you have any further question on this subject or in any other aspect of our Federal/State relations, please let me know.

Sincerely,
/s/ JOSEPH C. CALDWELL
Joseph C. Caldwell
Acting Director
Office of Pipeline Safety

cc:

Chairman, West Virginia Public Service Commission"

D. STATUTORY PROVISIONS INVOLVED

1. Section 3(b) of the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. §1672(b), Pub.L. 90-481, August 12, 1968, 82 Stat. 720) provides in pertinent part as follows:

> "(b) Not later than twenty-four months after August 12, 1968, and from time to time thereafter, the Secretary shall, by order, establish minimum Federal safety standards for the transportation of gas and pipeline facilities. Such standards may apply to the design, installation, inspection, testing, construction, extension, operation, replacement, and maintenance of

pipeline facilities. Standards affecting the design, installation, construction, initial inspection, and initial testing shall not be applicable to pipeline facilities in existence on the date such standards are adopted. Whenever the Secretary shall find a particular facility to be hazardous to life or property, he shall be empowered to require the person operating such facility to take such steps necessary to remove such hazards. Such Federal safety standards shall be practicable and designed to meet the need for pipeline safety. In prescribing such standards, the Secretary shall consider—

"(1) relevant available pipeline safety data;

"(2) whether such standards are appropriate for the particular type of pipeline transportation;

"(3) the reasonableness of any proposed standards; and

"(4) the extent to which such standards will contribute to public safety.

Any State agency may adopt such additional or more stringent standards for pipeline facilities and the transportation of gas not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act as are not incompatible with the Federal minimum standards, but may not adopt or continue in force after the minimum Federal safety standards referred to in this subsection become effective any such standards applicable to interstate transmission facilities."

2. Section 5(c)(1) of the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. §1674(c)(1), Pub.L. 90-481, §5, August 12, 1968, 82 Stat. 722, amended Pub.L. 92-401, §§1,2, August 22, 1972, 86 Stat. 616) provides:

"(c)(1) Except as otherwise provided in this section, if an application is submitted not later than September 30 in any calendar year, the Secretary shall pay out of funds appropriated or otherwise made available up to 50 per centum of the cost of the personnel, equip-

ment, and activities of a State agency reasonably required, during the following calendar year to carry out a safety program under a certification under subsection (a) or an agreement under subsection (b) of this Section; or to act as agent of the Secretary with respect to interstate transmission facilities. The Secretary may, after notice and consultation with a State agency, withhold all or any part of the funds for a particular State agency if he determines that such State agency (A) is not satisfactorily carrying out a safety program under a certification under subsection (a) or an agreement under subsection (b) of this section, or (B) is not satisfactorily acting as agent of the Secretary with respect to interstate transmission facilities. No such payment may be made unless the State agency making application under this subsection gives assurances satisfactory to the Secretary that the State agency will provide the remaining cost of such a safety program and that the aggregate expenditures of funds of the State, exclusive of Federal grants, for gas safety programs will be maintained at a level which does not fall below the average level of such expenditures for the last two fiscal years preceding the date of enactment of this section."

3. Section 1, Article 1 of the West Virginia Gas Pipeline Safety Act (West Virginia Code Ann. §24B-1-1) provides:

> "It is hereby declared to be the purpose and policy of the legislature in enacting this chapter to empower the public service commission of West Virginia, in addition to all other powers conferred and duties imposed upon it by law, to prescribe and enforce safety standards for pipeline facilities as hereinafter defined, and to regulate safety practices of persons engaged in the transportation of gas as hereinafter defined."

4. Section 3 of Article 5 of the West Virginia Gas Pipeline Safety Act (West Virginia Code Ann. §24B-5-3) provides as follows:

"(a) Every pipeline company shall pay a special license fee in addition to those now required by law. The amount of such fees shall be fixed by the public service commission and levied by it upon each of such pipeline companies according to the number of three inch equivalent pipeline miles included in its pipeline facilities, and shall be apportioned among such pipeline companies upon the basis of the pipeline companies' reports submitted to the commission in such form as the commission may prescribe, so as to produce a revenue of not more than ninety thousand dollars per annum, which fees shall be paid on or before the first day of July in each year.

"(b) Such sums collected under section six [§24B-4-6], article four hereof and under subsection (a) of this section shall be paid into the state treasury and kept as a special fund, designated 'public service commission gas pipeline safety fund,' to be appropriated as provided by law for the purpose of paying the salaries of the commission, as fixed by this chapter, its expenses and salaries, compensation, costs and expenses of its employees. Any balance in said fund at the end of any fiscal year shall not revert to the treasury, but shall remain in said fund and may be appropriated as provided in this subsection."